

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**CRIMINAL REVISION APPLICATION No. 766 of 2005****For Approval and Signature:****HONOURABLE MR.JUSTICE A.M.KAPADIA**

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- 1 Whether Reporters of Local Papers may be allowed to see the judgment ?
 - 2 To be referred to the Reporter or not ?
 - 3 Whether their Lordships wish to see the fair copy of the judgment ?
 - 4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
 - 5 Whether it is to be circulated to the civil judge ?

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CHETNA D.GHARYA & 3 - Applicant(s)
Versus
STATE OF GUJARAT & 1 - Respondent(s)

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Appearance :

MR SP MAJMUDAR for Applicant(s) : 1 - 4.
MR HM PRACHCHHAK, APP for Respondent(s) : 1,
MR HARDIK A DAVE for Respondent(s) : 2,

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CORAM : HONOURABLE MR.JUSTICE A.M.KAPADIA**Date : 04/10/2005****ORAL JUDGMENT**

1. Rule. Mr.H.M.Prachchhak, learned APP appears and waives service of notice of rule on behalf of respondent No.1 - the State of Gujarat, whereas

Mr.Hardik A.Dave, learned advocate appears and waives service of notice of rule on behalf of respondent No.2.

2. By filing instant petition under Section 397 read with Section 401 of the Code of Criminal Procedure ("the Code" for short), the applicants seek to challenge the order dated 26.8.2005 recorded below application Exh.1 in Criminal Misc.Application No.328 of 2005 by the learned JMFC, Vadodara, by which the application filed by the opponent No.2 - husband under Section 97 of the Code to take the custody of minor female child named "mudra" from applicants No.2 to 4 has been granted and accordingly applicants No.2 to 4 were directed to hand over minor child "mudra" to the opponent No.2 - husband. It is, therefore, prayed to quash and set aside the said order.

3. There is no dispute to the fact that applicant No.1 is a lawfully wedded wife of opponent No.2 and there is some matrimonial dispute between them and therefore both of them are residing separately. Applicant No.1 is residing with the applicants No.2 to 4 who are parents and brother of applicant No.1. According to say of opponent No.2, applicant No.1 is permanently serving at Surat and therefore minor female

child "mudra" is staying with the applicants No.2 to 4 who have no legal right to keep the custody of female child, therefore, opponent No.2 filed an application under Section 97 of the Code to take the custody of minor female child "mudra" from applicants No.2 to 4. The said application came to be granted which has given rise to this present petition at the instance of applicant No.1 who is the mother of minor female child "mudra".

4. At the time of hearing of this application, Mr.V.A.Purohit, learned advocate for Mr.S.P.Majmudar, learned advocate for the applicants, submitted that applicant No.1 is permanently residing at Vadodara with her parents and her brother at the address given in the cause title of the petition and in this connection, she has also filed undertaking which is notarized before notary. As per said undertaking, she has already left the job at Surat and at present she is residing with her parents at address C-3, Shri Sai Dham Society, Makarpura Road, Sussain Cross Road, behind Priyadarshani Nagar, Baroda. She has also stated that the gross income of her father who is working in S.T. Department is Rs.11,480/- per month. She has further stated that her brother is working as a

technician in IPCL and his gross income is Rs.12,000/- per month. Therefore, income of her family is enough for the maintenance of her minor daughter. She has further undertake that she will take all necessary care of her minor child in the event of custody being given to her.

5. This Court has considered the submissions advanced by learned advocates appearing for the parties, perused the impugned order, undertaking filed by the applicant No.1 wife and the statutory provisions contained under the Hindu Minority and Guardianship Act, 1956 ('the Act' for short).

6. There is no manner of doubt that as per sec.6(a) of the Act the custody of a minor who has not completed the age of five years shall ordinarily be with the mother as she is a natural guardian. Admittedly, female child "mudra" is below five years. Therefore, obviously, the custody of female child "mudra" should be with the applicant No.1 who is the mother. The learned Magistrate has handed over custody of minor child to the father from the parents of the applicant No.1 since at the relevant time she was residing at Surat and not at Vadodara with her family

members. Now, applicant No.1 has come forward with the solemn undertaking that she is residing at Vadodara with her parents and brother, and therefore this Court deem it expedient that the custody of minor female child "mudra" should be handed over to applicant No.1. However, at the same time, opponent No.2, who is father of the child, who is also a natural guardian also should be provided visitation right to meet his minor daughter once in a week.

7. Seen in the above context, this petition deserves to be allowed by quashing and setting aside the order which is impugned under this petition. Of course by giving visitation right in favour of opponent No.2 permitting him to meet his minor daughter once in a week.

8. For the foregoing reasons, the petition succeeds and accordingly it is allowed. The order dated 26.8.2005 recorded in Criminal Misc. Application No.328 of 2005 by the learned JMFC, Vadodara, is quashed and set aside, and resultantly the opponent No.2 is directed to hand over the custody of minor female child "mudra" to the applicant No.1 and opponent No.2 has a visitation right to meet his daughter on every Sunday,

between 11.00 a.m., and 5.00 p.m.

9. It is made clear that applicant No.1 shall act as per the undertaking filed by her before this Court. Solemn undertaking filed by applicant No.1 shall be retained on record of the case.

Rule is made absolute to the aforesaid extent.

(A.M. Kapadia, J.)

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